83-30

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MONIKA BAGBY, et al., PETITIONERS

v.

CYRUS VANCE, et al.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the uniform application of the Federal Rules of Civil Procedure thwarted by the conflicting positions of the Ninth Circuit Court of Appeals and other courts of appeals as to when dismissals for lack of diligent prosecution are proper?

2. Is Northern District of California Local Court Rule 235-11 invalid as contrary to Rules 41 and 83 of the Federal Rules of Civil Procedure?

3. Does a United States District Court have the inherent power or discretion to dismiss an action sua sponte for lack of diligent prosecution where plaintiff's counsel is neither dilatory nor contumacious and where the case is filed only four months prior to its dismissal?

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Petitioners Monika Bagby, Thomas Bogue, James Bogue, Teena Turner, and Robert and Virginia Richardson respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 30, 1983, which affirmed an order of dismissal of Petitioners' action, entered by the District Court for the Northern District of California.

OPINIONS BELOW

The unreported memorandum decision of the Court of Appeals is set forth in Appendix A.

The order of dismissal of the District Court For the Northern District of California is set forth in Appendix B.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The judgment of the Court of Appeals was entered on March 30, 1983. No petition for reconsideration was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL JURISDICTION BEFORE THE DISTRICT COURT

Jurisdiction of the United States District Court was invoked under the Federal Tort Claims Act,[1] 42 U.S.C. §1981-1982, and under the United States Constitution.[2]

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The rules involved in this case are Rules 41(b) and 83 of the Federal Rules of Civil Procedure, and Northern District of California Local Rule 235-11. Rule 41(b) pertains to involuntary dismissal of actions for failure to prosecute diligently, and reads, in relevant part, as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Rule 83 authorizes the United States District Courts to promulgate local rules that are not

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[1] 28 U.S.C. sections 1346, 1621 to 2680.

[2] First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments.

inconsistent with the Federal Rules of Civil Procedure, and that Rule reads as follows:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Local Court Rule 235-11 of the United States District Court for the Northern District of California pertains to dismissals for lack of prosecution. That rule reads as follows:

> Each judge may from time to time notice for hearing on a dismissal calendar such actions or proceedings assigned to that judge which appear not to have been diligently prosecuted. Whenever it appears that plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge may order it dismissed; failure to serve the initial pleading within 40 days of filing and, in the absence of an order by the assigned judge setting any date for any pretrial proceeding or for trial, failure by plaintiff to take action for four months shall be presumtive evidence of lack of prosecution. Unless otherwise ordered by the assigned judge, each party shall, not less than ten days prior to the noticed hearing date, serve and file a certificate setting forth the status of the action or proceeding and whether good cause exists to dismiss it for failure to prosecute. Nothing in this Rule shall preclude any party from filing a motion to dismiss an action or proceeding for failure to prosecute under Rule 41(b), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

NATURE OF THE ACTION

On October 13, 1981, Petitioners filed their complaint with the United States District Court for the Northern District of California.[3] The claims alleged by Petitioners against various former and present government agencies and officials result from the tragic shootings and suicides of Peoples Temple members and others in Guyana in November, 1978.

Petitioners Teena Turner, James Bogue, and Robert and Virginia Richardson seek recovery for the wrongful deaths of their heirs. Petitioners Thomas Bogue, Monika Bagby, and Teena Turner also seek recovery for permanent injuries sustained as a result of gunshot wounds suffered at the Port Kaituma Airstrip in Guyana.[4]

Certain of the Petitioners[5] also seek recovery for

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[3] Appendix C

[4] These shootings occurred simultaneously with that of Congressman Leo Ryan, who was fatally wounded.

[5] Monika Bagby, James and Thomas Bogue, and Teena Turner.

false imprisonment and denial of their civil rights during their captivity in Guyana. Petitioners seek both compensatory and punitive damages as recovery for their claims against Respondents.

This action for damages is pursuant to rights guaranteed Petitioners under the United States Constitution,[6] certain federal statutes,[7] and at common law.[8]

COURSE OF PROCEEDINGS BELOW
AND STATEMENT OF MATERIAL FACTS

After filing their complaint with the U.S. District Court, no further activity occurred in this case until February 2, 1982, when the Honorable Judge Stanley A. Weigel sent Petitioners an order to show cause why the action should not be dismissed pursuant to Local Rule 235-11 for lack of diligent prosecution.[9]

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[6]Amendments One, Four, Five, Nine and Fourteen.
[7]28 U.S.C. §§1346, 1621-2680; 42 U.S.C. §§1981-1982.
[8]The common law claims sound in tort and contract.
[9]Appendix D

On February 12, 1982, Petitioners' counsel filed a certification explaining why the case should not be dismissed.[10] Petitioners' counsel opposed dismissal of the action for two reasons. First, counsel had never had a federal civil case before and was unfamiliary with the Court Rules. Counsel was under the mistaken impression that the prior rule requiring service within six months was still in effect. In fact, Local Rule 235-11 now requires service within 40 days or else the court is empowered to dismiss the case for lack of diligent prosecution.

Second, counsel argued that the complexity of the case required more time than 40 days before effective service could be made. Location of some defendants was difficult, and service of at least one necessary defendant would be impossible as he was somewhere in Asia.[11] Counsel hoped that a congressional investigation of the tragedy would take place, revealing more specifically what U.S. agencies and individuals were involved and how extensive

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[10] Appendix E

[11] Richard Dwyer, allegedly an agent of the CIA, who was at the Port Kaituma Airstrip when the shootings complained of occurred, and at Jonestown when the mass suicide-murders were occurring.

In this regard, circumstances in this case lead Petitioners to believe that a concerted effort exists to prevent any public disclosure of the facts of United States government involvement with the Peoples Temple throughout the entire tragic episode. Several authors[12] have revealed great discrepancies in "official" statements concerning the nature and extent of the official involvement with the Temple. No full scale congressional investigation has yet occurred of the events almost five years passed, even though almost 1,000 United States citizens perished. Petitioners believe that because most of the Peoples Temple members were elderly, black, and politically powerless, and because they perished in a little known foreign country, there is little incentive for the official investigation such a tragedy deserves. Absent such an investigation, the only was the truth may come to light may be through court cases such as this one. Further, because all of the State of California actions against the Peoples Temple have been

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[12] See, e.g., Reston, Our Father Who Art in Hell, 1981; Nugent, White Night, 1979; Wooden, The Children of Jonestown, 1981.

settled, Petitioners believe that there is great pressure on the federal judiciary from other branches of government to prevent any federal actions from reaching trial.

When Petitioners' counsel appeared at the scheduled hearing ordered by Judge Weigel, counsel stated that he believed this action would likely be consolidated with similar actions in the same court and another action in the Central District of California District Court.[13] Further, counsel told Judge Weigel that he had been informed that there was a nine month delay in service by the United States Marshal.[14] Counsel felt that this made the 40 day rule rather pointless.

After counsel's comments to Judge Weigel, notwithstanding counsel's certification papers, Judge Weigel ordered the case dismissed.[15]

Petitioners thereafter timely noticed an appeal to

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[13]Appendix F

[14]Appendix F

[15]Appendix F

the Ninth Circuit Court of Appeals and submitted briefs on the issue of whether Judge Weigel had abused his discretion in dismissing Petitioners' action. Petitioners argued that Judge Weigel had done so for the following reasons:

1. The case was "young" -- that is, it was filed only four months prior to its dismissal.

2. Counsel had not otherwise failed to comply with any court rules or otherwise been dilatory.

3. Petitioners' counsel was inexperienced in federal civil litigation.

4. The case was too complex for service to be affected in 40 days as some defendants could not be located and others were not in the country when the complaint was filed.

5. The court had given counsel no notice that dismissal would result if service were not effected within 40 days.

6. Local Rule 235-11 of the District Court for the Northern District of California was harsh, unrealistic and impossible to comply with in the case at bar.

7. Local Rule 235-11 was not known by Petitioners' counsel nor was it well known in the legal community.

8. The court had less drastic alternative sanctions available other than dismissal which were more appropriate for such a minor procedural infraction.

On March 30, 1983, the Ninth Circuit Court of Appeals entered its memorandum decision,[16] affirming the dismissal by the District Court. Petitioners did not seek a rehearing before that court. This petition for a writ of certiorari followed.

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16 Appendix A

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE ISSUE OF WHEN DISMISSALS FOR THE LACK OF DILIGENT PROSECUTION ARE PROPER, AND THIS CONFLICT WILL RECUR UNLESS RESOLVED BY THIS COURT.

A. THE ARTICULATED STANDARD OF THE NINTH CIRCUIT UNDER WHICH DISMISSALS FOR LACK OF DILIGENT PROSECUTION ARE PROPER DIFFERS FROM THE STANDARD EMPLOYED BY OTHER COURTS OF APPEALS

Numerous courts of appeals have limited the discretion of their district courts to dismiss actions for failure to diligently prosecute to those cases where clear evidence of deliberate delay or contumacious conduct by the plaintiff exists. Dove v. Codesco (4th Cir. 1978) 569 F.2d 807; Graves v. Kaiser Aluminum and Chemical Co. (5th Cir. 1976) 528 F.2d 1360; Holt v. Pitts (6th Cir. 1980) 619 F.2d 558; Moore v. St. Louis Music Supply (8th Cir. 1976) 539 F.2d 1191. Those courts of appeals have articulated three primary reasons for so restricting such dismissals.

First, the policy of the law favors the disposition of cases on the merits. Holt v. Pitts, supra; Dove v. Codesco, supra.

Second, lesser sanctions are always available to insure that court rules and orders are complied with. Graves v. Kaiser Aluminum and Chemical Co., supra.

Finally, because dismissal for lack of prosecution is so harsh a sanction it is warranted only in extreme situations, such as where a plaintiff has engaged in dilatory or contumacious conduct. Holt v. Pitts, supra; Anthony v. Marion County General Hospital (5th Cir. 1980) 617 F.2d 1164.

The position of the Ninth Circuit on this issue stands in stark contrast to that of other courts of appeals. The Ninth Circuit does not limit the discretion of its District Courts to dismiss actions for failure to diligently prosecute to those cases where the plaintiff has displayed dilatory or contumacious conduct. See States Steamship Co. v. Phillipine Airlines (9th Cir. 1970) 426 F.2d 803; Pearson v. Dennison (9th Cir. 1968) 353 F.2d 24; Anderson v. Airwest, Inc. (9th Cir. 1976) 542 F.2d 522. Rather, the Ninth Circuit permits its District Courts to dimiss actions for failure to diligently prosecute in the exercise of their sound discretion, absent the delineated restrictions which exists in the other circuits. The

District Courts in the Ninth Circuit are permitted to dismiss actions for failure to diligently prosecute where plaintiffs have been neither dilatory nor contumacious.

Two results obtain from the conflict between the Ninth Circuit and other Courts of Appeals on this issue. First, the District Courts of the Ninth Circuit are vested with judicial discretion denied the District Courts in other Circuits. It was not the design or intent of the Congress that the United States District Courts it created be vested with differing discretionary powers depending upon their location. Neither statutory nor constitutional authorization exists to justify such a result.

Second, plaintiffs in the Ninth Circuit stand in a far different position from plaintiffs in other circuits when faced with dismissal for failure to diligently prosecute their actions. Whereas plaintiffs in other Circuits need only demonstrate that their conduct has been neither dilatory nor contumacious in order to avoid dismissal of their actions, such a demonstration by plaintiffs in the Ninth Circuit will not necessarily defeat such dismissals. In short, plaintiffs in the Ninth Circuit bear a much heavier burden when faced with dismissals for

failure to diligenty prosecute their actions than do plaintiffs in other judicial circuits.

Unless this Court resolves this conflict, the inequities created by it will recur to the particular detriment of plaintiffs in the Ninth Circuit.

B. THE PROPER STANDARD GOVERNING DISMISSALS FOR LACK OF DILIGENT PROSECUTION IS THAT WHICH IS EMPLOYED BY OTHER COURTS OF APPEALS AS IT FURTHERS THE LIBERAL AIMS OF THE FEDERAL RULES OF CIVIL PROCEDURE

The policy of the law, and one of the underlying purposes of the Federal Rules of Civil Procedure, is to afford plaintiffs a chance to litigate their cases on the merits. As this Court stated in Foman v. Davis (1962) 371 U.S. 178, 181-182:

> [T]he Federal Rules of Civil Procedure are designed to prevent federal civil practice's becoming "...a game of skill in which one misstep by counsel may be decisive to the outcome. . . [but rather they are designed] to facilitate a proper decision on the merits."

The courts should not prevent what the policy of the law and the Federal Rules of Civil Procedure were designed to promote.

In the case at bar, the quoted language of this Court in Foman v. Davis, supra,is very appropriate. Petitioners' counsel has made one procedural misstep by failing to serve his complaint upon named Respondents within the time limitation prescribed by local rule 235-11 of the District Court for the Northern District of California. Counsel's single procedural error may indeed prove decisive to the outcome of Petitioners' case. Although the District Court's dismissal of Petitioners action was without prejudice, it will have the same effect as dismissal with prejudice due to the bar of the applicable statute of limitations.[17]

In light of the policy of the law favoring disposition of cases on their merit, Petitioners fail to see what legitimate goal is served in dismissal of their action by the District Court only four months after it had been filed.

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[17] The statute of limitations for Petitioners' constitutional claims against th eindividual defendants under Bivens v. Six Unknown Named Agents (1971) 403 U.S. 388 appears to be three years. DeMalherbe v. International Union of Elevator Const. (ND CA 1978) 449 F.Supp. 1335 The other statute of limitatons involved will also have run if the opinion of the Court of Appeals is not reversed.

Speed in clearing the docket is the only goal achieved by such a dismissal. But it has been wisely held by one court that speed simply for the sake of speed is not the purpose to be served by allowing dismissal for failure to prosecute. Cherry v. Brown-Frazier-Whitney (DC CA 1976) 548 F.2d 965.

Petitioners submit that the policy of the law and the intent of the Federal Rules of Civil Procedure that cases be litigated and determined on their merits are more effectively carried out by permitting dismissals for lack of diligent prosecution only where the plaintiff has displayed dilatory or contumacious conduct. Where plaintiff or his counsel has deliberately acted in contravention of court orders or rules, dismissal is indeed an appropriate remedy. Holt v. Pitts, supra. However, where plaintiff makes a single procedural error early in the prosecution of his action, the resulting dismissal of his action is clearly contrary to the policy of law favoring the disposition of cases on their merits and to the intent of the Federal Rules of Civil Procedure. Other courts of appeals have recognized this distinction, and concluded

that dismissals for failure to diligently prosecute should be upheld only when plaintiffs have been either dilatory or contumacious in the prosecution of their actions. Holt v. Pitts, supra; Dove v. Codesco, supra; Moore v. St. Louis Music Supply, supra; Graves v. Kaiser Aluminum and Chemical Co., supra; Anthony v. Marion County General Hospital, supra.

Petitioners respectfully submit that the policy of the law favoring the disposition of cases on their merit and the intent of the Federal Rules of Civil Procedures require that dismissals for lack of diligent prosecution should only be upheld when plaintiffs have been either dilatory or contumacious in the prosecution of their cases. Any other result is antithetical to both the policy of law and the intent of the Federal Rules of Civil Procedure. Foman v. Davis (1962) 371 U.S. 178.

II. NORTHERN DISTRICT OF CALIFORNIA LOCAL COURT RULE 235-11 IS INVALID AND CONTRARY TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. THE STANDARD DEVELOPED UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(b) FOR DISMISSAL FOR FAILURE

TO DILIGENTLY PROSECUTE IS UNDERCUT BY LOCAL COURT RULE 235-11, CONTRARY TO RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 41(b) of the Federal Rules of Civil Procedure permits dismissals for lack of diligent prosecution upon a motion by defendant. The rules are silent as to dismissal of actions for lack of diligent prosecution sua sponte by the District Courts. Petitioners' research into dismissals pursuant to Rule 41(b) has revealed one of the following two factors is almost always present before courts will grant dismissals.

1. Failure by the plaintiff to comply with court timetables, requests or orders by the trial judge: Cherry v. Brown-Frazier-Whitney (DC CA 1976) 548 F.2d 965 (Plaintiff failed to confirm his trial readiness after requested by judge to advise him of case status); Jafree v. Scott (7th Cir. 1978) 590 F.2d 209 (Plaintiff failed to comply with court order to file new affidavit); Zavala Santiago v. Gonzalez Rivera (1st Cir. 1977) 553 F.2d 710 (After judge set pretrial conference plaintiff failed to appear or to advise judge that they would be unable to do so); Dowdell v. Sunshine Biscuits, Inc. (DC CA 1981)

90 F.R.D. 107, aff'd 673 F.2d 1343 (Plaintiff failed to abide by court procedures and policies, to commence discovery until 18 months after complaint was filed, failed to heed admonitions to prepare case and to follow their own discovery schedule); Johnson v. Town of Babylon, New York (DC NY 1978) 78 F.R.D. 337 (Plaintiff's counsel failed to appear at call of case following warning by court that such failure would not be tolerated); Sheaffer v. Warehouse Imp. Union Local #730 (DC CA 1969) 408 F.2d 204 (Plaintiffs repeatedly violated local court rules and pretrial orders and continually filed untimely motions and papers); Stanley v. Continental Oil Company (10th Cir. 1976) 536 F.2d 914 (Plaintiff failed to comply with court orders); Theodoropoulos v. Thompson-Starret Co. (2nd Cir. 1969) 418 F.2d 350 (Attorney failed to check docket or comply with order to promptly move case to trial); Maiorani v. Kawasaki Kisen K.K. (DC NY 1969) 49 F.R.D. 131, aff'd 425 F.2d 1162 (Plaintiff was on notice as to date action would be reached for trial and deliberately absented himself without requesting adjournment or providing standby); U.S.N. Co. v. American Express Co. (DC PA 1972)

55 F.R.D. 31 (Plaintiff repeatedly violated court orders and deadlines).

2. Lengthy passage of time during which no activity has occurred in the case, evidencing dilatory or contumacious conduct by plaintiff: Hollenbeck v. California Western R.R. (9th Cir. 1972) 465 F.2d 122 (No activity for over two years); Bautista v. Concentrated Employment Program of Department of Labor (9th Cir. 1972) 459 F.2d 1019 (No activity for ten months); Ballew v. Southern Pacific Co. (9th Cir. 1970) 428 F.2d 787 (No activity for a year and a half); States Steamship Co. v. Phillippine Airlines (9th Cir. 1970) 426 F.2d 803 (Plaintiff failed to respond to defendant's interrogatories for over 13 months); Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance Et D'Armene (2nd Cir. 1974) 508 F.2d 814 (Swiss corporation produced no valid excuse for four year delay for service of complaint upon four corporate defendants in an anti-trust action and action dismissed against those four defendants); S & K Airport Drive-In, Inc. v. Paramount Film Distributing Corp. (DC PA 1973) 58 F.R.D. 4, aff'd 491 F.2d 751 (Almost seven years inactivity in the case); Citizens

Utilities Co. v. American Telegraph and Telephone Co. (9th Cir. 1979) 595 F.2d 1171 (Action pending for 16 years but not yet tried); Wenzoski v. City Corp. (DC CA 1979) 480 F.Supp. 1056 (Three years elapsed between filing of complaint and service on any defendants).

The common thread connecting the above cited cases granting or upholding dismissals under Rule 41(b) is that plaintiffs must be reasonable diligent in pursuing their cases and must not engage in dilatory or contumacious conduct; otherwise, dismissal is a proper sanction. Local Rule 235-11 totally cuts that common thread by establishing a prima facie case for dismissal where plaintiff has merely failed to serve his complaint on defendants within 40 days. The District Court Local Rules, whose promulgation is authorized by Rule 83 of the Federal Rules of Civil Procedure, are prohibited from being inconsistent with those Federal Rules. Rodgers v. U.S. Steel Corp. (3rd Cir. 1975) 508 F.2d 152. The inconsistency of Local Rule 235-11 with the cases decided under Rule 41(b) of the Federal Rules of Civil Procedure appears on the face of the rule itself. Failure to serve the complaint upon the defendants within 40 days is presumptive evidence of lack of prosecution under the rule and, as in our case,

dismissal can result. No dilatory or contumacious conduct is necessary and no lengthy passage of time is required before dismissal can result under the local rule. Rather, the local rule presumes that lack of service within 40 days is presumptive evidence of lack of diligent prosecution. While petitioners recognize that every court has the inherent authority to clear its docket, the exercise of such authority merely because plaintiff has failed to serve his complaint within 40 days by dismissal of plaintiff's complaint strikes at the very heart of the Federal Rules of Civil Procedure which were designed to allow litigants a chance to have their cases heard and disposed of on the merits. This local rule is contrary to decisional law articulating when dismissals for lack of diligent prosecution are proper, it is contrary to the intent of the Federal Rules of Civil Procedure and the policy of the law that cases be disposed of on their merits, and serves no purpose which overrides these primary tenets of the law.

Many commentators have recognized that the integrity of the Federal Rules of Civil Procedure is threatened by

the proliferation of local rules for the District Courts.[19]

As one commentator has noted,

> Although Rule 83 authorizes local rules, it had been expected that these would be few in number and confined to purely housekeeping matters. Instead, the use of local rules has been extensive and they cover a great variety of important matters. This in itself is a threat to uniformity of procedure throughout the country, local rules often provide "a series of traps" for lawyers from other districts, and the very casual manner in which the judges in a district decide to adopt a rule or set of rules is in striking contrast to the care with which the Civil Rules themselves are made and amended. Almost every study of experience with local rules had demonstrated how unsatisfactory it has been.
> Wright, Federal Courts, Section 62, pg. 407.

As this local rule is contrary to the Federal Rules of Civil Procedure, the policy of the law which favors the determination of actions on their merits, and contrary to decisional law upon when dismissals for lack of diligent

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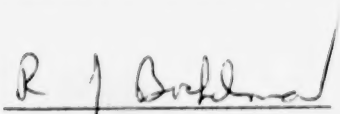
19 Wright, Federal Courts, 4th ed., 1983, section 62; Note, The Local Rules of Civil Procedure in the Federal District Courts -- A Survey, 1966, Duke L.J. 1011; Friedenthal, The Rule Making Power of the Supreme Court; A Contemporary Crisis, 1975, 27 Stan. L.Rev. 673; Lesnick, The Federal Rule-Making Process: Time for Re-examination, 1975, 61 A.B.A.J. 579; Weinstein, Reform of Court Rule-Making Procedures, 1977

prosecution are proper, Petitioners respectfully request that this Court issue a writ of certiorari to declare this local rule invalid as contrary to Federal Rules of Civil Procedure.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted



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June 24, 1983

APPENDIX A

MONIKA BAGBY, JAMES BOGUE, JUANITA BOGUE, THOMAS BOGUE, ROBERT and VIRGINIA RICHARDSON,

Plaintiffs-Appellants,

v.

CYRUS VANCE, et al.,

Defendants-Appellees.

No. 82-4210

United States Court of Appeals,

Ninth Circuit

Submitted

January 31, 1983

Decided March 30, 1983

BROWNING, SNEED, and SCHROEDER, Circuit Judges

Appellants' complaint set forth claims against numerous individuals who served under President Carter, four agencies of the United States, and the House of Representatives of the United States Congress. Its thrust is that James Jones conspired with those charged to massacre the members of the Peoples Temple. Although filed on October 13, 1981, the complaint was never served. On February 2, 1982, the district court issued an order to show cause why the complaint should not be dismissed for want of prosecution. Plaintiffs responded on February 12, 1982, and a hearing on the order to show cause was held on February 25. On the same date a judgment of dismissal of the action was entered. The plaintiffs entered a timely appeal and we now affirm the judgment of the district court.

We should overturn a district court's sua sponte dismissal of an action only upon a showing of an abuse of discretion. Link v. Wabash Railroad, 370 U.S. 626

(1962); Tolbert v. Leighton, 623 F.2d 585 (9th Cir. 1980). No such abuse is present in this case.

Appellants attempt to justify their failure to obtain service of the complaint on these grounds:

(1) The case was complex.

(2) Extensive discovery is necessary.

(3) Counsel was unaware of Local Rule 235-11.

(4) Local Rule 235-11 operates harshly in a complex case.

(5) The district court failed to consider less drastic alternatives to dismissal.

The first two reasons are frivolous; the third is substantially untrue; the fourth is wrong; and the fifth is contradicted by the record.

The district court weighed such factors as the extent of the delay, the reasons for the delay, the presumption of prejudice arising from the delay, whether plaintiff was warned that delay might result in dismissal, and whether less drastic alternatives would serve the court's purpose. We cannot say that the balance it struck in favor of dismissal was arbitrary and capricious.

AFFIRMED.

APPENDIX B

MONIKA BAGBY, et al.,

Plaintiffs

vs

CYRUS VANCE, et al

Defendants.

No. C 81-4077 SAW

United States District Court

Northern District of California

JUDGMENT OF DISMISSAL

February 25, 1982

WEIGEL, District Court Judge

This case is before the Court pursuant to an order to show cause why it should not be dismissed for lack of prosecution pursuant to Local Rule 235-11. Having considered the pertinent facts, records and files, all parties having been heard or, given ample notice and opportunity for hearing, having failed to appear, the Court finds, after considering less stringent alternatives, that dismissal without prejudice is the most appropriate Court action in the premises. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that this action be, and is hereby, dismissed without prejudice.

APPENDIX C

MONIKA BAGBY, et al.,

Plaintiffs

v.

CYRUS VANCE, et al.,

Defendants

No. C-81-4077 SAW

United States District Court

Northern District of California

Filed

October 13, 1981

COMPLAINT

JURY DEMAND

1. Plaintiffs hereby demand a jury trial as to all causes of action in which a jury trial is permitted by law that Plaintiffs have as hereinafter alleged. Specifically, a jury trial is demanded as to all causes of action for civil rights violations.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to Title 18, USCS §§1385, 1702 and 2510-20, and Title 42, UCCS §1985(3), and this civil action seeks money damages arising under the First, Fourt, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution. Jurisdiction of this Court is pedicated upon Title 28, USCS §§1331(a), 1343(4), 1361, 2201 and 2202; Title 18, USCS §§1702 and 2520, Title 42, USCS §1985(3), and the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution. Jurisdiction of this Court is also invoked pursuant to 28 USCS §1343(3) in that this action is brought pursuant to the Thirteenth Amendment of the United States Constitution to redress the deprivation of rights,

privileges and immunities secured thereby. This action is also brought pursuant to 42 USCS §§1981 and 1982, to secure the right of Plaintiffs to make and enforce contracts and receive security of persons and property as enjoyed by white citizens, and to enforce the rights of Plaintiffs in inherit, purchase, lease, sell, hold and convey real and personal property on the same basis as white citizens. Jurisdiction also lies under 28 USCS §§ 1331, 1332 and 1343 and this action is also brought under 42 USCS §§ 1343, 1983, and 1985, 1988 and 1986. This action is also brought pursuant to the Federal Tort Claims Act, 28 USCS §1671-2680 and 28 USCS §1346.

3. The matter in controversy, exclusive of interest, costs and attorney's fees, exceeds $10,000.00.

PARTIES

4. Plaintiffs Monika Bagby, James Bogue, Thomas Bogue, and Teena M. Turner all reside in San Francisco, California. Plaintiff Juanita Bogue resides in Burlingame, California. Plaintiffs Robert and Virginia Richardson reside in Liberal, Kansas.

5. Defendant Cyrus Vance at all times herein mentioned was the Secretary of State, and in that capacity exercises authority over and is responsible for the Department of State and all its subsidiary organizations.

6. Defendant John R. Burke, at all times herein mentioned was the United States ambassador to Guyana and in that capacity exercises authority over and is responsible for the American Embassy and Consulates in Guyana and all of their subsidiary organizations.

7. Defendant Richard A Dwyer, at all times herein mentioned, was the Deputy Chief of Mission of the State Department, American Embassy Consulate, and in that capacity exercises authority over and is responisble for said mission and all of its subsidiary organizations.

8. Defendant Elizabeth Powers, at all times mentioned, was of the Special Consular Services, Department of State, and in that capacity exercises authority over and is responsible for said Special Consular Services and all of its subsidiary organizations.

9. Defendant Stansfield Turner, at all times herein mentioned, was the Director of the Central Intelligence

Agency and all its subsidiary organizatons.

10. Defendant Robert E. Chasen, at all times herein mentioned, was the United States Commissioner of Customs, and in that capacity exercised authority over and was responsible for said Customs Department and all its subsidiary organizations.

11. Defendant Griffin B. Bell, at all times herein mentioned, was the Attorney General of the Department of Justice of the United States, and in that capacity exercised authority over and was responsible for said Department and its subsidiary organizations.

12. Doe 1 through Doe 55, inclusive, were employed by and/or agents or servants of the Central Intelligence Agency and are intentionally and/or negligently responsible for the damages and injuries to plaintiffs hereinafter complained.

13. Doe 501 through Doe 1000, inclusive, were employed by and/or are agents or servants of the Department of State and are intentionally or negligently responsible for the damages and injuries to Plaintiffs which are hereinafter complained.

14. Doe 1001 through Doe 1500, inclusive, were employed by and/or are agents or servants of the U.S. Department of Justice and are intentionally and/or negligently responsible for the damages and injuries to Plaintiffs which are hereinafter complained.

15. Doe 1501 through Doe 2000, inclusive, were employed by and/or are agents or servants of the United States Customs Service and are intentionally and/or negligently responsible for the damages and injuries to plaintiffs which are hereinafter complained.

16. Doe 2001 through Doe 2500, inclusive, were employed by and/or are agents or servants of the United States House of Representatives and are intentionally and/or negligently responsible for the damages and injuries to plaintiffs which are hereinafter complained.

17. Defendant Clement Zablocki, at all times herein mentioned, was chairman, Department on International Relations, of the United States House of Representatives, and in that capacity exercised authority over and was responsible for said House and all its subsidiary organizations.

FACTS

18. For a period of time, the length of which is not known to Plaintiffs, but which includes, on information and belief, the period from 1963 until November 18, 1978, James Warren Jones was an employee, servant, agent, or operative of the Defendant Central Intelligence Agency. The Defendants Central Intelligence Agency, the Department of Justice, Stansfield Turner, Griffin B. Bell, and their predecessors in office, pursuant to a conspiracy, through intellitence agents and other unknown persons acting under the direction and control of said Defendants have engaged in a course of conduct which includes overt and covert physical surveillance, data collection, suppression of criminal evidence, and an active plan to enhance the economic and political powers of James Warren Jones. The purpose of this plan was to amass said economic and political power in James Warren Jones so that persons tending toward a socialistic perspective would align themselves with James Warren Jones so that he and said Defendants could best control these persons. During said period of time, from 1963 until November 18, 1978, said Defendants aided and abetted

James Warren Jones' aggrandizement of political and economic power and failed to investigate reports of wrongdoing by James Warren Jones.

19. Defendant Elizabeth Powers of the Special Consular Service, Department of State, was an employee of the Department of State and on June 23, 1978, she received a letter from Jeffrey A. Haas that had enclosed an affidavit by Deborah Blakey. Ms. Blakey's affadavit warned of the dangers in Jonestown that became a reality on November 18, 1978. Mr. Haas' letter described the situation in Jonestown as "most critical", and he warned that the State Department's investigation as to the actual conditions in Jonestown was "inadequate."

20. Cyrus Vance, State Department, Central Intelligence Agency, United States Department of Justice, United States Customs Service, United States House of Representatives, Stansfield Turner, Griffin B. Bell, Robert E. Chasen and their predecessors in office, and Does 1 through 2500, or one or more of them knew, or by the exercise of ordinary care would have known, that a plan existed for the killing and massacre of members of the Peoples Temple and that this plan constituted a peril and hazard to the members

of the Peoples Temple and to their personal safety and public tranquility of persons and Plaintiffs as members of the Peoples Temple.

21. On April 10, 1978, and for a long time prior and subsequent thereto, the defendants knew, or should have known by the exercise of reasonable dilligence, that a large number of people in the Peoples Temple would be massacred.

22. Notwithstanding that under the Constitution of the United States of America and the laws of the United States of America and the constitution and laws of the State of California, the defendants were empowered and duly authorized to prevent or aid in preventing the denial of equal protection of the laws and Constitution of the United States to plaintiffs, the defendants, acting in concert, wrongfully neglected to prevent civil rights violations against the plaintiffs.

23. Notwithstanding the provisions of law which empowered the defendants to secure to plaintiffs the equal privileges and immunities under the Constitution and Laws of the United States, that are secure to white persons, which

defendants could have secured to plaintiffs by the exercise of reasonable dilligence, the defendants, acting in concert, wrongfully neglected to prevent or aid in preventing the commission of such wrongs against plaintiffs.

24. James Warren Jones barred the plaintiffs from ownership, contracting to purchase and from purchasing any property. The plaintiffs, like all members of the Peoples Temple were systematically defrauded of their real and personal property. Defendants, and each of them, knew or should have known of James Warren Jones' refusual to permit members of the Peoples Temple to own real and personal property.

25. Defendants Richard A Dwyer, John R. Burke, Cyrus Vance, State Department, Central Intelligence Agency, Stansfield Turner, Griffin B. Bell, and their predecessors in office, received numerous warnings in the form of affidavits and statements made by concerned relatives and numerous requests for assistance to aid the impending plight of the members of the Peoples Temple in Jonestown, Guyana. Defendant Clement Zablocki, and Defendant House of Representatives and Does 2001 through 2500, also received warnings and requests for assistance to said

persons in Jonestown, Guyana. Despite these defendants being empowered and authorized to aid or to prevent the denial of equal protection and to secure equal privileges and immunities to said persons in Jonestown, Guyana, and to the members of the Peoples Temple in California, the Defendants, acting in concert, wrongfully neglected to prevent or aid in preventing the commission of the wrongs, fraud, intentional infliction of emotional distress, wrongful death, intentional interference with contract rights, all to the detriment of plaintiffs and their civil rights.

26. Defendants Clement Zablocki, House of Representatives, and Does 2001 through 2500, were empowered and authorized by the Constitution and Laws of the United States of America to commission study missions. Congressman Leo Ryan sought approval from said Defendants to conduct a study mission to Guyana during the period of November 13-19, 1978. These defendants had been forewarned of the dangers in Jonestown, Guyana, and despite these dangers and warnings, authorized Congressman Ryan to conduct a trip to Jonestown, Guyana. This authorization was granted

when said Defendants knew, or should have known with the use of dilligence, that said Congressman Ryan's mission to Guyana would result in the killings and injuries that occurred in and about Jonestown, Guyana on November 18, 1978. Despite this knowledge, said Defendants did nothing to secure the safety of American citizens including Plaintiffs, in Jonestown, Guyana.

27. Defendants Central Intelligence Agency and Stansfield Turner and his predecessors in office, knew that James Warren Jones was an agent, employee, servant and/or operative of the Central Intelligence Agency, Said Defendants knew that they had commissioned James Warren Jones to embark upon a plan to control and to ultimately massacre members of the Peoples Temple. Said Defendants knew that James Warren Jones falsely imprisoned, assaulted and battered, defrauded, intentionally inflicted emotional distress, and systematically, continuously and routinely deprived Plaintiffs, as members of the Peoples Temple, of their civil rights as granted by the Constitution and Laws of the United States of Amerca. Moreover, these Defendants knew, and participated in mind control and drug experimentation upon the plaintiffs and the people in Jonestown, Guyana. Said acts of these defendants occurred in

California and in Jonestown, Guyana.

28. Robert E. Chasen, United States Customs Service, and Does 1501 trhough 2000, knew or should have known through the exercise of due dilligence in the performance of their functions and duties, that arms, ammunition, illegal drugs and poisons were being shipped to Jonestown, Guyana from the United States in preparation for the massacre of the members of the Peoples Temple in Jonestown, Guyana. Despite this knowledge and duties, these defendants did nothing to prevent or to aid in preventing the violations of the plaintiffs' civil rights and the tortious conduct to which they were subjected, from 1974 through November 18, 1978.

29. Plaintiffs Monika Bagby, Thomas Bogue, and Teena M. Turner were assaulted and battered and suffered gunshot woulds at the Port Kaituma air strip, Guyana, on November 18, 1978. They sustained permanent injuries as a result of these shootings. These injuries were sustained as a proximate result of the Defendants' failure to protect and make safety in Jonestown, Guyana. Defendants United States House of Representatives breached their duty of care owed to these plaintiffs to transport them safely back to the

United States.

30. Plaintiffs Teena M. Turner and James Bogue seek recovery for the wrongful death of their heirs occasioned by the aforementioned acts of the defendants. Teena M. Turner was the wife of Bruce Turner and he suffered a wrongful death in Jonestown, Guyana on November 18, 1978. James Bogue was the father of Marilee Faith Bogue and she suffered a wrongful death in Jonestown, Guyana on November 18, 1978. Said wrongful deaths were the proximate result of the aforesaid acts and failure to act of said defendants.

31. Plaintiffs, and each of them, were falsely imprisoned for various and many years in Jonestown, Guyana, and during this time they were denied their civil rights. Moreover, they were victims of deceit and misrepresentation that deprived them of compensation for their services rendered. They were defrauded of their property and they were subject to reckless, intentional and negligent acts through which they suffered emotional distress. The aforesaid injuries resulted and were the proximate cause of the aforementioned acts of the Defendants.

32. Plaintiffs Robert and Virginia Richardson seek recovery for the wrongful death of their daughter

occasioned by the aforementioned acts of the Defendants. Robert and Virginia Richardson were the parents and heirs of Kathy Richardson Purifoy and she suffered a wrongful death in Jonestown, Guyana on November 18, 1978. The proximate result of this wrongful death was the wrongful acts and failures to act of Defendants as aforesaid.

33. The aforesaid acts of the Defendants, and each of them, was done with fraud, malice, oppression and unconcious, reckless disregard for the safety, heath and well being of Pliantiffs. Plaintiffs seek exemplary damages as a result of the aforesaid acts.

34. Plaintiffs Teen M. Turner, Thomas Bogue, and Monika Bagby, having shot and wounded at Port Kaituma airstrip were caused and did incur medical expenses and treatment, all proximtely caused by the acts and failures to act of said Defendants.

35. Attached are Plaintiffs' claims against the aforementioned defendant departments of the United States Government.

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. To Plaintiff Robert Richardson the sum of $1,005,000;

2. To Plaintiff Virginia Richardson the sum of $1,005,000;

3. To Plaintiff James Bogue the sum of $3,000,000;

4. To Plaintiff Teena M. Turner the sum of $4,000,000;

5. To Plaintiff Juanita Bogue the sum of $1,000,000;

6. To Plaintiff Thomas Bogue the sum of $2,000,000;

7. To Plaintiff Monika Bagby the sum of $1,400,000;

8. Punitive damages in the sum of $50,000,000;

9. The reasonable costs and attorney's fees of Plaintiffs;

10. Such other relief as the Court may deem proper.

I hereby declare under penalty of perjury that the foregoing is true and correct, except for those facts alleged on information and belief, and I believe those facts to be true.

APPENDIX D

MONIKA BAGBY, et al

vs

CYRUS VANCE, et al

No. C 81-4077 SAW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORDER TO SHOW CAUSE RE: DISMISSAL

February 2, 1982

Robert Bockelman
23 Grant Avenue, 5th Floor
San Francisco, CA 94108

YOU ARE HEREBY NOTIFIED that Judge Stanley A. Weigel has ordered all parties to this action to appear in Courtroom 8, United States Court House, 450 Golden Gate Ave., San Francisco, California, on Thursday, February 25, 1982, at 2:15 pm., then and there to show cause by actual appearance in Court, why this action should or should not be dismissed for lack of prosecution or otherwise disposed of as provided by Local Rule 235-11; and,

IT IS HEREBY ORDERED that, at leas ten (10) days prior to the date above specified for actual appearance in Court, counsel for all parties shall file with the Clerk a Certificate of Counsel (and deliver a duplicate thereof to the undersigned deputy clerk), showing cause why this action should or should not be dismissed for lack of prosecution. The certificate shall set forth the nature of the cause, its present status, the reason it has not been brought to trial or otherwise terminated, and its expected course if not dismissed.

Please take notice that this order requires BOTH the specified court appearance AND the filing (and lodging of a duplicate) of the specified certificate.

FAILURE TO FULLY COMPLY WITH THIS ORDER WILL BE DEEMED SUFFICIENT GROUND TO DISMISS THIS CAUSE.

APPENDIX E

MONIKA BAGBY, et al,

Plaintiffs

vs.

CRYUS VANCE, et al.

Defandants.

No. C81 4077 SAW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CERTIFICATION OF COUNSEL

AS TO WHY CAUSE SHOULD NOT BE DISMISSED

February 11, 1983

I, Robert J. Bockelman, hereby certify the following:

That I am the only member of the law firm of Robert J. Bockelman, Inc., attorney of record for the above named plaintiffs.

That I have prepared the pleadings in the above entitled action and have read all of the pleadings in the above entitled action.

That because of the nature of the circumstances and its involvement and complexities and because of the great expense involved, I have only conducted extensive, but incomplete, investigations as to the circumstances surrounding the conduct and actions of the defendants concerning the incidents in which the plaintiffs' claims are based.

On the basis of the information I have received, I hereby certify that the above entitled action is wrongful death, assault and battery, and false imprisonment, and civil rights violations.

This action is brought by five persons who were defecting with Congressman Ryan. The action is brought under the Federal Torts Claim Act and for Civil Rights Violations.

MONIKA BAGBY, JAMES BOGUE, JUANITA BOGUE, THOMAS BOGUE, and TEENA TURNER sought to leave Jonestown, Guyana with Congressman Ryan on November 18, 1978. Congressman Ryan represented to them that they would be given Congressional protection in route to the United States. MONIKA BAGBY, TEENA TURNER and THOMAS BOGUE were all shot and injured at the Port Kaituma Airstrip by members of the Peoples Temple. Cathy Purifoy Richardson was killed in Jonestown, Guyana on November 18, 1978; ROBERT and VIRGINIA RICHARDSON are the parents and heirs of said decedant. The plaintiffs allege that the events in Jonestown, Guyana occured as a result of the intentional and/or negligent acts of the defendants.

There have been hearings conducted on behalf of the officers of the Secretary of State that have revealed acts of negligence and carelessness in permitting Congressman Ryan to go to Jonestown unprotected and without advising him of information that allegedly was in the possession of officers of the Secretary of State and which would have revealed an extremely dangerous and explosive situation.

There has been information that has come to me that would indicate a large amount of mind controlling drugs and supplies of weapons and ammunition were being kept and used by Jim Jones at Jonestown with the consent, knowledge and aid of the Central Intelligence Agency of the United States.

At the present time one of the leading witnesses whose name is Larry Layton has been tried for the shooting of Congressman Ryan by the United States. This trial has ended in a hung jury. I have been advised that the government intends to try Larry Layton a second time. This prevents us from taking a deposition of Larry Layton. Until this matter has been finally completed Larry Layton will, on the advice of counsel, take the Fifth Amendment.

It has been announced that the House of Representatives, through committee, will commence a full scale hearing into the events that took place in Jonestown, Guyana, Port Kaituma, Guyana and within the Peoples Temple.

It will save a tremendous amount of money and time if attorneys for plaintiff in this action can have the benefit of listening to this testimony and reading the transcript.

It is obvious that this case is very involved and the facts are far from clear at present time.

It will be far more difficult to obtain discovery under the Freedom of Information Act of important and necessary documents in this case until the Larry Layton trial is completed as well as the Congressional hearing has been concluded.

The law offices of Lewis, Lewis and Less have filed similar actions against the United States government on behalf of the heirs of Congressman Ryan and on behalf of Shirley Humphrey.

Another action has been filed in the Los Angeles district by a Los Angeles law firm based on the same facts and involving the family of another member of the medial who was killed at the airstrip.

When all the cases have been filed the court may then see fit to have them tried together.

Political involvements of Jim Jones and the Peoples Temple are becoming known as more writers investigate, and as more participants author books. The investigation

on this case is a mammoth task and considerable effort on this law office's part occurs and is occurring on a daily and weekly basis. At this time I have approximately three more books that have recently been released that must be considered in prosecuting this case.

As more is known on this case it is believed that the complaint will require amendment. At this time, discovery is at last being permitted in the action against Peoples Temple which is being terminated by a receiver. This discovery will necessitate further amendment of the complaint, regarding theories and parties.

Counsel for the plaintiffs has no experience with federal civil court rules. There is a CEB course in late March that will educate me. I was unaware of the rule provided in 235.11 that provides for a dismissal for failure to serve the initial pleading within 40 days of filing. The Local Rules of the United States District Court of the Northern District of California that I had were effective August 1, 1977. In reliance on this copy of the Rules, I believed that the six-month rule previously provided was the applicable rule. Because of the complexity of this case and because of the parties

involved, if I had known the rule and began service of process on the first day after filing of the complaint, it is very doubtful that I could have compled with this rule.

Under all of the above circumstances I believe that it would be a miscarriage of justice at this stage of the proceeding to dismiss this action.

Because of the above circumstances it is impossible to advise the court at this time who the witnesses will be or a timetable for discovery or an estimate of when a trial date would be feasible. Discovery on the Peoples Temple dissolution terminates on April 5, 1982, and it is our intent to amend our complaint within 60 days thereafter. Hopefully by this point in time, the prosecution of Larry Layton will have commenced and the Congressional hearings will have been held.

For all of the above reasons I do hereby certify as attorney for the above plaintiffs that the above entitled action should not be dismissed.

APPENDIX F

MONIKA BAGBY, et al.,

Plaintiff

v.

CYRUS VANCE, et al.,

Defendants

No. C-81-4077 SAW

United States District Court

Northern District of California

Reporter's Transcript

February 25, 1982

BEFORE: WEIGEL, Judge of United States District Court, Northern District of California

February 25, 1982

THE CLERK: C-81-4077 Monika Bagby, et al. vs. Cyrus Vance, et al.

Counsel, state your appearance, please.

MR. BOCKELMAN: Good afternoon, your honor, I am Robert J. Bockelman.

THE COURT: Good afternoon.

MR. BOCKELMAN: With regard to my certification papers, I really don't have too much to add, other than whay I have said here.

THE COURT: Very well. Is the matter submitted?

MR. BOCKELMAN: Yes, your honor. There is only one thing I probarly would like to add, and that is, with regard to the 40-day rule, it is my understanding that the marshal in Federal Court previously was serving the summons.

I am aware of the case that the law offices of Marvin Lewis filed. He indicated to me that he had

his summons with the marshal for approximately nine months before they were served.

I hope in your order that if you have any direction-- Well, first of all, a question: Has that case, the case filed by Marvin Lewis' office, is that one before you and will there be a consolidation of this case with that case? It is my understanding--

THE COURT: I don't know what case you refer to.

MR. BOCKELMAN: That would be Ryan vs. The United States.

THE COURT: Does it have a number?

MR. BOCKELMAN: Yes, your honor, 80-3147.

THE COURT: Does it have initials?

MR. BOCKELMAN: WAI.

THE COURT: You can find out from the clerk's office what that means. Is the matter submitted?

MR. BOCKELMAN: Yes, your honor.

THE COURT: The case is dismissed.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MONIKA BAGBY, et al., PETITIONERS

v.

CYRUS VANCE, et al.

PROOF OF SERVICE - AFFIDAVIT

I, Keith Davis, a law clerk in the law offices of Robert J. Bockelman, attorney of record for Plaintiffs, Appellants herein, depose and say that on the 27th day of June, 1983, I served a copy of the foregoing Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the Solicitor General's Office of the Department of Justice, Washington, D.C. and the United States Attorney's Office in San Francisco by mailing the same to the Solicitor General and Mr. John Barg of the United States Attorney's Office, counsel of record for Respondent located at 450 Golden Gate, San Francisco, California.

I swear that the foregoing is true under penalty of perjury.

Keith Davis

No. 83-30

In the Supreme Court of the United States

OCTOBER TERM, 1983

MONIKA BAGBY, ET AL., PETITIONERS

v.

CYRUS VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-30

MONIKA BAGBY, ET AL., PETITIONERS

v.

CYRUS VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the district court erred in dismissing their complaint for lack of diligent prosecution.

1. Petitioners are former residents or representatives of former residents of Jonestown, Guyana. Their complaint (Pet. App. C), filed in the United States District Court for the Northern District of California, alleges various acts of negligence and intentional misconduct by numerous named and unnamed government officials[1] arising out of the shootings and suicides of People's Temple members and others in

[1]Petitioners named as defendants Secretary of State Cyrus Vance; United States Ambassador to Guyana John R. Burke; Richard A. Dwyer, Deputy Chief of Mission of the State Department, American Embassy Consulate; Elizabeth Powers of the Special Consular Services, Department of State; Director of Central Intelligence Stansfield Turner; United States Commissioner of Customs Robert E. Chasen; Attorney General Griffin B. Bell; and Rep. Clement Zablocki, Chairman of the House Committee on Foreign Affairs. Unnamed defendants include 55 agents of the CIA, 500 Department of State employees, 500

Jonestown in November 1978. The complaint seeks $13 million in compensatory damages and $50 million in punitive damages. Although petitioners filed their complaint on October 13, 1981, none of the defendants was ever served.

On February 2, 1982, the district court ordered petitioners' counsel to appear at a hearing scheduled for February 25, 1982, in order to show cause why petitioners' action should not be dismissed for lack of prosecution, pursuant to N.D. Cal. R. 235-11. Pet. App. D. Local Rule 235-11, in conformity with Rules 41(b) and 83 of the Federal Rules of Civil Procedure, authorizes district judges in the Northern District of California to notice a case for hearing on a dismissal calendar for lack of diligent prosecution. Pet. 4. The local rule specifically provides that a plaintiff's failure, *inter alia*, to serve a defendant with the initial pleading within 40 days of filing "shall be presumptive evidence of lack of prosecution." *Ibid.* In accordance with Local Rule 235-11, petitioners' counsel also was ordered to file a certificate setting forth "the nature of the cause, its present status, the reason it has not been brought to trial or otherwise terminated, and its expected course if not dismissed." Pet. App. D2.

In his certification, petitioners' counsel contended first that his failure to serve the complaint within the 40-day limit resulted from the complexity of the case. He stated (Pet. App. E5-E6) that the factual issues surrounding the events in Jonestown were "far from clear at present time" and that additional discovery would "necessitate further amendment of the complaint, regarding theories and parties." Counsel for petitioners also represented (*id.* at E6) that he had "no experience with federal civil court rules" and that he was planning to take a "CEB course in late

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Department of Justice employees, 500 Customs Service employees, and 500 "agents or servants" of the House of Representatives. Pet. App. C4-C6.

March [1982] that will educate me." Specifically, he claimed (*ibid.*) that he was unfamiliar with Local Rule 235-11 and that he had relied upon an outdated copy of the local rules in preparing his case. Finally, counsel asserted (Pet. App. E6-E7) that "[b]ecause of the complexity of this case and because of the parties involved, if I had known [of] the rule and began service of process on the first day after filing of the complaint, it is very doubtful that I could have [complied] with this rule."

Following a hearing on February 25, 1982 (Pet. App. F), and "after considering less stringent alternatives" (Pet. App. B2), the district court dismissed petitioners' action without prejudice. *Ibid.* The court of appeals affirmed. Pet. App. A.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

a. Petitioners contend that N.D. Cal. R. 235-11, which authorizes district courts to dismiss actions "which appear not to have been diligently prosecuted," is contrary to the Federal Rules of Civil Procedure. This claim is baseless.

Fed. R. Civ. P. 41(b) specifically authorizes the entry of involuntary dismissals "[f]or failure of the plaintiff to prosecute." This Court also has recognized "the power of courts, acting on their own initiative, to clear their calenders of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief." *Link* v. *Wabash R.R.*, 370 U.S. 626, 630 (1962).

Moreover, contrary to petitioners' suggestion (Pet. 23), Local Rule 235-11 did not mandate dismissal here "merely because plaintiff failed to serve his complaint within 40 days." By its terms, the rule simply creates a *rebuttable* presumption that a plaintiff who does not serve a complaint

within 40 days of filing is not prosecuting diligently. Indeed, the rule expressly provides a plaintiff with the opportunity to file a written certification and make a personal appearance to show " 'whether good cause exists to dismiss [the action or proceeding] for failure to prosecute.' " Pet. 4, quoting N.D. Cal. R. 235-11.

Here, petitioners' complaint had been filed for nearly four months before the district court ordered them to show cause why it should not be dismissed for failure to prosecute. Even after learning of Local Rule 235-11 and the requirement for prompt service upon penalty of dismissal, petitioners made no attempt to serve *any* of the numerous named defendants and gave no indication of an intent to make service immediately.[2] Instead, petitioners' counsel attempted to excuse his failure to comply by reliance on the complexity of the case and his own unfamiliarity with the local rules of practice (see pages 2-3, *supra*). But the complexity of a case and the consequent need for discovery cannot excuse the failure to serve process upon a named defendant. To the contrary, the need for prompt service is particularly acute in complex cases so that the defendants, as well as the plaintiffs, are afforded adequate time for preparation of their case. See *Anderson* v. *Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). Nor does petitioners' counsel's alleged unfamiliarity with local law excuse his noncompliance; attorneys practicing before a district court are charged with knowledge of its rules. In these circumstances, the district court acted well within its discretion in dismissing petitioners' complaint for failure to prosecute.

b. Petitioners rely heavily (Pet. 15) on the underlying purpose of the Federal Rules of Civil Procedure "to afford plaintiffs a chance to litigate their cases on the merits."

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[2]Rather, petitioners' counsel's apparent intention was to continue discovery until April 1982 and "to amend our complaint within 60 days thereafter." Pet. App. E7.

Although the district court specifically dismissed their complaint without prejudice, petitioners claim (Pet. 16; footnote omitted) that the dismissal "will have the same effect as dismissal with prejudice due to the bar of the applicable statute of limitations."

At no point in either his written certification (Pet. App. E) or his oral presentation (Pet. App. F) did petitioners' counsel advise the district court that a dismissal without prejudice would preclude him from refiling the action. In any event, the policy of the Federal Rules of Civil Procedure to encourage litigation of cases on their merits does not override a defendant's interest in freedom from defending stale claims. Cf. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

> To permit a delay in service when the complaint is served immediately prior to the running of the statute of limitations undercuts the purposes served by the statute. Once the statute has run, a potential defendant who has not been served is entitled to expect that he will no longer have to defend against the claim. If service can be delayed indefinitely once the complaint is filed within the statutory period, then expectations are defeated and the statute of limitations no longer protects defendants from stale claims.

Anderson v. *Air West, supra*, 542 F.2d at 525. Here, the injuries that are the subject of petitioners' complaint occurred on November 18, 1978. According to petitioners' counsel (Pet. 16 n.17), the longest applicable statute of limitations "appears to be three years," and petitioners' complaint was filed on October 13, 1981. Pet. App. C1. In these circumstances, the district court did not abuse its discretion in dismissing petitioners' complaint when service of process had not even been attempted by February 25, 1982.

c. Petitioners argue that the standard of review employed by the court of appeals in affirming the district court's order of dismissal conflicts with the standard employed by other courts of appeals. This claim also lacks merit.

In affirming the district court's dismissal of petitioners' complaint, the court of appeals expressly relied (Pet. App. A2) on the abuse of discretion standard mandated by this Court in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962). Accord, *e.g.*, *Cherry* v. *Brown-Frazier-Whitney*, 548 F.2d 965, 969-970 (D.C. Cir. 1976); *Ramsey* v. *Bailey*, 531 F.2d 706, 708 (5th Cir. 1976), cert. denied, 429 U.S. 1107 (1977); *Michelsen* v. *Moore-McCormack Lines, Inc.*, 429 F.2d 394, 395 (2d Cir. 1970). Applying that standard, the court of appeals observed (Pet. App. A3) that the district court had weighed all of the relevant factors, including the extent of the delay, the reasons for the delay, the presumption of prejudice arising from the delay, whether petitioners had been warned that delay might result in dismissal, and whether less drastic alternatives would serve the court's purposes. Indeed, the court of appeals independently evaluated the grounds proffered by petitioners in the court of appeals[3] in justification of their failure to serve the complaint and remarked (Pet. App. A3): "The first two reasons are frivolous; the third substantially untrue; the fourth is wrong; and the fifth is contradicted by the record." As a result, the court of appeals concluded (*ibid.*) that it was unable to "say that the balance * * * struck [by the

[3]In the court of appeals, petitioners argued (Pet. App. A3): (1) the case was complex; (2) extensive discovery was necessary; (3) counsel was unaware of Local Rule 235-11; (4) Local Rule 235-11 operated harshly in a complex case; and (5) the district court failed to consider less drastic alternatives to dismissal.

district court] in favor of dismissal was arbitrary and capricious."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[4]None of the cases on which petitioners rely (Pet. 12) involved conduct similar to petitioners' failure to effectuate service on any of the named defendants within more than four months of the filing of the complaint, even after notification by the district court that such failure could result in dismissal. In *Holt* v. *Pitts*, 619 F.2d 558 (6th Cir. 1980), the district court had dismissed an action by an incarcerated plaintiff for failure to prosecute on the basis of the plaintiff's failure to appear at two preliminary hearings. The court of appeals held that the district court had "clearly abused its discretion" in so ruling, where the reason for the plaintiff-inmate's failure to appear was the district court's refusal to issue a writ for his production. In *Dove* v. *CODESCO*, 569 F.2d 807 (4th Cir. 1978), the court held that dismissal was not warranted by counsel's absence from a pretrial conference that was the result of local counsel's failure to notify non-resident counsel that a conference was scheduled. Similarly, in *Graves* v. *Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360 (5th Cir. 1976), the court held that the district court had erred in dismissing an action with prejudice on the basis of plaintiff's counsel's failure to submit a proposed pretrial order and failure to reschedule a pretrial conference where, the court assumed (*id.* at 1362), the failure to appear resulted from a mix-up in dates. Finally, in *Moore* v. *St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976), the court held that the district court had abused its discretion in entering a dismissal with prejudice on the basis of the plaintiff's and his counsel's failure to appear on a rescheduled trial date, where counsel's absence was due to conflicting court obligations.

No. 83-30

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OCTOBER TERM, 1983

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v.

CYRUS VANCE, et al.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The United States, in its Opposition Memorandum, forwards several arguments why this Court should not grant certiorari in the instant case. The United States argues that:

1) Contrary to Petitioner's allegations, the standard of review of dismissals for lack of dilligent prosecution employed by the Ninth Circuit is not in conflict with the standard of review similarly employed by other courts of appeals. (Res. Mem. 6)

2) Counsel for Petitioners failed to serve any named defendants after receipt of the order to show cause why the case should not be dismissed and

discovery that counsel was in violation of local rule 235-11. (Res. Mem. 2)

3) Complex cases such as the case at bar require prompt service to afford defendants adequate time to prepare their cases. (Res. Mem. 4)

4) Permitting a delay in service shortly before the running of the statute of limitations undercuts the purpose of the statute. (Res. Mem. 5)

Petitioners reply to these arguments in sequence.

I

The United States argues that the stardard of review employed by the Ninth Circuit in dismissals for lack of diligent prosecution is not in conflict with the standard similarly employed by other courts of appeals. This argument will not withstand scrutiny.

In the Ninth Circuit, the district courts are free to dismiss cases for lack of diligent prosecution in the sound exercise of their discretion.[1]

The ninth Circuit places no restrictions on the discretion of its district courts to dismiss such cases except that the district court may not abuse its discretion in so doing. No dilatory or contumacious

[1]See Pet. 13, cases cited therein.

conduct by plaintiff is required to uphold such dismissals on appeal.

In other circuits, the courts of appeals have set down in a very clear restriction for their district courts: dismissals of cases for lack of prosecution are proper only where the plaintiff has been dilatory or contumacious.[2]

Thus, to say as the United States does, that there is no conflict between the decision presented here to this Court and decisions of other courts of appeals is a misstatement of fact. To say that there is no conflict between the standard of review employed by the Ninth Circuit in such dismissals and the standard of review similarly employed by other circuit courts of appeals is a misstatement of law.

This argument of the United States lacks merit.

II

Respondents argue that counsel for Petitioners should have served the named defendants after receipt of the order to show cause why the case should not be

[2]See cases, Pet. 12-15.

dismissed since counsel was then put on notice that counsel was in violation of local rule 235-11. Respondents seem to believe that such service by counsel would have effected compliance by Petitioners with the rule. No reading of the rule gleans this result.

Counsel did not serve the respondents after receipt of the order to show cause precisely because counsel realized he was in violation of the rule. Rather, counsel chose to forthrightly explain why he had not effected service on respondents. (Pet. App. E.) Counsel felt that since a hearing was already scheduled regarding the possible dismissal, counsel would wait until after the hearing to effect such service or to undertake whatever course of action was ordered by the district court.

Respondents imply in this argument that there is a lack of good faith on the part of Petitioners in prosecuting this action, as demonstrated by the absence of such service after the receipt of the order to show cause. Petitioners would not have gone

to the time and expense of an appeal and this certiorari petition if Petitioners were not generally interested in going forward with this case.

III

Respondents argue that complex cases such as this one require prompt service on defendants to better enable them to prepare an adequate defense. Whatever merit such argument has as a general rule, it is of no help to Respondents in the instant case.

The various named Respondents have between them almost all of the available information on the extent of governmental involvement in the Jonestown tragedy. Such information has not been forthcoming notwithstanding Petitioners' various requests under the Freedom of Information Act. Respondents cannot say they cannot adequately prepare a defense when they alone, at present, know the full extent of their involvement.

Further, Respondents, at least many of them, have the vast resources of the United States government upon which to draw for legal assistance.

Petitioners' counsel is a sole practitioner. The posture of the parties in this case, Petitioners respectfully submit, renders this argument of the United States illusory.

IV

Respondents' final argument is that the purpose of the statute of limitations is thwarted by permitting a delay in service shortly before the running of the statute. Respondents cite language in Anderson v. Air West (9th cir. 1976) 542 F.2d 522 in support of this arguement.

The language in Anderson, supra, refers to an indefinite delay in service after the complaint has been filed as frustrating the purpose of the statute of limitations. No arguments or documents in the case at bar suggest that Petitioners' counsel intended to indefinitely delay service upon Respondents. Indeed, the district court could have required service within a certain period of time on pain of dismissal. Anderson, supra, is of no help to Respondents, and their argument is inapposite.

As none of the Respondents' arguments are of help to them, Petitioners respectfully request that this Court grant the relief requested in Petitioners' certiorari petition.

Respectfully submitted,

R. J. Bockelman

Robert J. Bockelman
Counsel for Petitioners

Date: October 4, 1983

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PROOF OF SERVICE - AFFIDAVIT

I, Keith Davis, a law clerk in the offices of Robert J. Bockelman, attorney of record for Plaintiffs, Petitioners herein, depose and say that on the 5th day of October, 1983, I served a copy of the foregoing Reply Memorandum of Petitioners on the Solicitor General's Office of the Department of Justice, Washington, D.C., by mail.

I swear that the foregoing is true under penalty of perjury.

Keith Davis

KEITH DAVIS